

responsibilities to ensure that only appropriate promotions appear in children's programs, and to take remedial measures in those relatively rare instances where program providers make inappropriate choices. In addition, the proposals to regulate promotions raise a host of practical and constitutional problems.

The fact is that television industry does a creditable job in ensuring that only appropriate promotions and advertisements appear in children programs. The CBS Television Network and Nickelodeon have long followed policies designed to protect children from exposure to inappropriate promotions and advertisements. Currently, the CBS Television Network and the CBS Owned television stations only promote other children's programming and appropriate general audience programs, such as TOUCHED BY AN ANGEL, within CBS's children's programs.<sup>79</sup> Children's programming on the CBS Television Network does not currently contain any outside advertising. When, in the past, such advertising was included in the Network's children's schedule, it was subjected to careful review under guidelines designed to ensure that only material appropriate for children's viewing was accepted. Of course, in the future, when advertising is returned to the schedule, it will be subject to similar review. Promotions and advertising for inclusion in children's programming on the CBS Owned stations formerly part of the Paramount Stations Groups similarly are screened for their suitability for child viewing. Because Nickelodeon is a children's programming service, the program promotions within it are only for children's programming. In addition, Nickelodeon puts all outside advertising through an extensive vetting process in order to ensure that all advertising

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<sup>79</sup> Some of the promotions for TOUCHED BY AN ANGEL broadcast during children's programming are specifically designed for children.

content adheres to the overall standards of the network and is consistent with Nickelodeon's core values in service of its child audience.

While the case for leaving clearance of promotions and advertisements in children's programming within the discretion of the industry is strong, the case for imposing governmental regulations is fraught with problems. One proposal raised in the Notice would require that promotions and advertisements themselves "be rated and encoded so that they can be screened by V-chip technology."<sup>80</sup> Even if the rating of promotions were left to programmers so as to avoid the obvious constitutional problem of governmental ratings, the notion of rating and encoding promotions is extremely impractical. Promotions are numerous, usually produced close to air time, and frequently not repeated. A requirement to establish a system to review, rate and encode them would therefore be onerous and virtually impossible to follow.<sup>81</sup> The Notice does not even address the question of who would be responsible for rating advertisements, nor the interference a ratings requirement would place into the business dealings of advertisers and program providers.

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<sup>80</sup> Notice at ¶ 36.

<sup>81</sup> Many of these same realities regarding promotions led the Commission to rule that it would be impractical and unfair to require them to be closed captioned. In exempting promotions from captioning requirements, the Commission took into consideration the number of promotions involved on a daily basis, the fact that promotions often are produced and completed only shortly before air time, and that the "resulting logistical problems would appear to be disproportionate to any benefits received." *Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, MM Docket No. 95-176, *Report and Order*, 13 FCC Rcd 3272, 3345, ¶ 151 (1997) ("Video Programming Accessibility"), *recon. granted in part and denied in part*, 13 FCC Rcd 19973 (1998).

A second proposal, this one to rate promotions and prohibit them from airing in “programs with a significant child audience” if they are not “consistent” with the rating of the program, raises additional problems. We submit that a regulatory system prohibiting the telecast of certain content in particular programs, based on a governmental assessment of whether a program’s child audience is “significant,” would raise serious First Amendment questions.<sup>82</sup>

V. The Commission Lacks The Statutory Authority To Require Broadcasters To Air Promotions Of Their Children’s Programming During Prime Time Or In Other Specified Day Parts Or To Air Public Service Announcements About The Value Of Educational Programming And The Meaning Of the E/I Icon

The Notice asks whether, in the interest of increasing “public awareness of the availability of core programming and how to locate it,” the Commission should require promotion of children’s programs during prime time or other specific day parts, and whether it should require broadcast of public service announcements about the value of educational programming and the meaning of the E/I icon.<sup>83</sup> These requirements are unnecessary, because of the promotional efforts already being undertaken by broadcasters on a voluntary basis. More fundamentally, the Commission lacks the statutory authority to impose such requirements.

As the Commission is well aware, the three major networks, employing varying methods of promotions suited to their particular circumstances, have promoted their

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<sup>82</sup> See, e.g., *Bolger v. Youngs Drugs Products Corp.*, 463 U.S. 60,73 (1983) (government may not reduce the adult population to only what is fit for children).

<sup>83</sup> Notice at ¶ 38.

children's programming vigorously. As reported in the Mass Media Bureau's *Preemption Report*, ABC promoted its 1997-1998 children's programming with both Friday prime time promotions and a much larger number of Saturday morning promotions in its children's schedule. ABC evidently ran Friday promotions because its "'TGIF' family-oriented programming on Friday nights" represented an appropriate vehicle, in ABC's estimation, for promoting children's programming.<sup>84</sup>

During the same year, CBS promoted its children's schedule heavily within its children's programming, averaging more than five and one half minutes of promotion every week.<sup>85</sup> The following year, CBS increased promotion of children's programming within that programming to an average of nearly eight minutes per week.<sup>86</sup> As noted above, this season, in addition to promotions during our children's block, the CBS Television Network's children's programming is being promoted in children's programming on Nickelodeon.

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<sup>84</sup> *Preemption Report* at 14, ¶ 35, 36.

<sup>85</sup> *Id.* at ¶ 39.

<sup>86</sup> *July 2, 1999 CBS Letter*. In 1997, CBS wrote to the Commission that, "[a]s an example" of its general, overall promotional plans for then upcoming 1997-1998 season, it would promote the CBS Television Network's children's programming in the network's Friday night prime time schedule. CBS adopted this plan because that schedule was specifically designed to appeal to families and could therefore be an efficient vehicle for such promotions. *See Letter of Martin D. Franks to Chairman Hundt and Commissioners, June 27, 1997*, at 2 ("*June 27, 1997 CBS Letter*"). In subsequent correspondence with the Commission, CBS repeatedly stated that, because its Friday night family-oriented programming schedule had failed in December 1997, and since its schedule on no other night offered a similarly efficient vehicle for the prime time promotion of its children's programming, it would for the most part rely on other promotional methods to advertise its children's programming. *See, e.g., January 24, 2000 CBS Letter*, at 2.

CBS has also employed the strength in radio of its sister company, Infinity Broadcasting Corporation, to inform the public of the availability of its children's programming. As stated in the *Preemption Report*, during the 1997-1998 season, "CBS-owned radio stations in markets in which CBS also owns a television station aired many thousands of announcements promoting CBS's children's educational and informational programming."<sup>87</sup> The following season, CBS broadcast "approximately 16,800 promotional announcements" for its children's programs "on 55 (of 58) CBS-owned radio stations in markets where CBS owns television stations."<sup>88</sup>

As reported in the *Preemption Report*, NBC, whose children's programming is targeted at teenagers, has chosen methods of promoting its children's programming different from those used by CBS and ABC's.<sup>89</sup> The important point to be drawn from the different approaches of the three networks is that different promotion campaigns may be appropriate, in light of differences in the target audience for the particular program in question, the availability for promotional purposes of other appropriate network programming, and the availability of other promotional opportunities that depend on the advertising resources at the disposal of the particular company.<sup>90</sup> While the Commission

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<sup>87</sup> *Preemption Report* at 15, ¶ 40.

<sup>88</sup> See Letter of Mark W. Johnson, Associate General Counsel, CBS Inc. to Roy J. Stewart, Chief, Mass Media Bureau, January 24, 2000, at 3 ("January 24, 2000 CBS Letter").

<sup>89</sup> *Preemption Report*, at 16-17, ¶¶ 42-45.

<sup>90</sup> In addition to broadcasting promotions, broadcasters also provide information about their educational and informational children's programming, including the dates and times of air, to the publishers of program guides. *Preemption Report* at 17-19, ¶¶ 46-

evidently would like to see promotions in prime time and perhaps other particular day parts, we do not believe there is any legitimate basis for the Commission to substitute its judgment for that of the broadcaster in determining how best to promote its programming.

Every broadcaster has an obvious interest in increasing the audience for its children's programming. CBS, in conjunction with its parent Viacom, has worked hard to accomplish this goal. In fact, CBS has experienced significant growth in the audience for its children's programming this season.<sup>91</sup> This accomplishment is attributable both to the improved quality of our programs and also our efforts in promotion. The choices Viacom and CBS have made, including the cross promotion with Nickelodeon, have worked well for the CBS Television Network. But other choices will undoubtedly be best for other broadcasters. As a practical matter, decisions on promotion should be left to the individual broadcaster, which can determine what efforts are most likely to result in increased child audiences.

The Commission should also leave promotion decisions to broadcasters because it lacks the statutory authority to intervene in this area. The Commission may believe that it is within some broad definition of the public interest to require broadcasters to

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53. There are listings of these programs, including notations that they are educational, in local newspapers, as well as publications like TV Guide.

<sup>91</sup> As reported in the trade press recently, CBS's new Nick Jr. lineup has posted "robust across-the-board Saturday demo increases" so far this year: "Among its target (kids 2 to 5), the Nick Jr. lineup's 2.8/13 marks a 180 percent increase over CBS's programming last season (1.0/5)." *Electronic Media*, October 30, 2000, at 2.

maximize their promotions of children's programs, so as to increase public awareness of their availability. But the United States Supreme Court has consistently held that:

[T]he use of the words "public interest" in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purposes of the regulatory statute.<sup>92</sup>

Notwithstanding the general "public interest, convenience and necessity" language in the Communications Act of 1934 and in Section 336 of the Telecommunications Act, the Commission has authority to regulate in the public interest only insofar as the regulated conduct bears on the agency's specific statutory charge.<sup>93</sup>

In the context of children's programming, we submit that the proposal to require specified promotions in prime time or elsewhere is outside the bounds of the Commission's specific statutory charge. The Children's Television Act has two specific purposes. As stated in the *Senate Report*:

The objective of this legislation is to increase the amount of educational and informational broadcast television programming available to children and to protect children from overcommercialization of programming.<sup>94</sup>

Pursuant to this statutory charge, the Commission has acted to increase the amount of children's programming available to children by establishing its processing guideline of three hours of "core" programming. As part of its definition of core programming, the

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<sup>92</sup> *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

<sup>93</sup> *See, e.g., Lutheran Church-Missouri Synod v. FCC*, 141 F. 3d 344, 354 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F. 3d 487 (D.C. Cir. 1998) ("the Supreme Court has held that an agency may pass antidiscrimination measures under its public interest authority only insofar as discrimination relates to the agency's specific statutory authority," *citing NAACP V. FPC*, 425 U.S. 662 (1976)).

<sup>94</sup> *Senate Report* at 1 (emphasis added).

Commission has even required that children's programs be broadcast during a particular window, 7:00 AM to 10:00 PM, when children are more likely to be watching.

Now, however, the Commission contemplates going beyond the statutory mandate of making increased amounts of children's programming *available*. Evidently not satisfied with the level of "parental awareness" of the availability of the programming, the Commission proposes to force broadcasters to expend resources to promote that programming in a manner chosen by the Commission, presumably until parental awareness rises to some level subjectively acceptable to the Commission. Providing children's programming, and educating the public about its availability, are two different things. The Commission has statutory authority to require broadcasters to do the first. But the Commission does not have the authority to force broadcasters to forfeit other promotional or commercial uses of its prime time schedule in order to meet the Commission's desire that parents receive additional notice – over and above what is offered in virtually every local newspaper – of the availability of children's programs that already have been scheduled for times when children are likely to see them. For similar reasons, the Commission lacks the authority to require broadcasters to expend resources and forfeit commercial opportunities in order to broadcast public service announcements – suited to the Commission's liking – about the value of educational and informational programming and the meaning of the E/I icon.<sup>95</sup>

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<sup>95</sup> Moreover, the fact that Congress may have authority to require broadcasters to increase their children's programming, does not provide authority for the Commission to require broadcasters to speak in favor of this programming. Compare *44 Liquormart, Inc. v. Rhode Island*, 517 U.S.484, 510-13 (1996), overruling *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328 (1986). To the contrary, forced advocacy of this kind raises First Amendment issues. See *Hurley v. Irish American Gay*,



The issue of parental awareness appears to be something of a stalking horse for a concern about the size of the audience for children's programming. Presumably, parental awareness is not a goal in and of itself, but a means of inducing more parents to get more children to watch educational and informational programming. As a threshold issue, there is no necessary correlation between the level of parental awareness and children's viewing habits. Nor does the Notice contain any evidence that children are not watching at least some educational and informational programming. Notwithstanding these issues, at bottom the Commission's proposal to force broadcasters to air more promotions of children's programming is an indirect attempt to increase the audience for these programs. Ultimately, the Commission simply does not have authority to mandate that the public, or specific subsections of it, watch programs favored by the Commission. Nor can it impose regulations on broadcasters to force them to take costly steps to try to increase the audience to a level satisfactory to the Commission.

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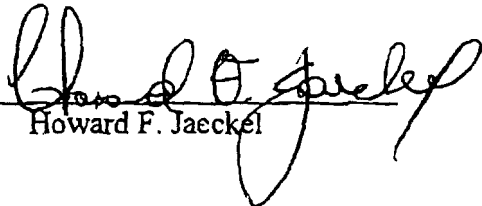
*Lesbian and Bisexual Group of Boston*, 515 U.S.557 (1995); and *Pacific Gas and Electric C. v. Public Utility Commission*, 475 U.S. 1 (1986).

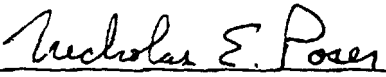
VI. Conclusion

For all of the foregoing reasons, the Commission should not adopt the various proposals raised in the Notice.

Respectfully submitted,

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